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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES NOEL WOODWARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the felony of making a false statement (18 U.S.C. 1001), arising out of a defendant's declaration on a Customs form that he is not carrying more than $5,000 into the United States, is a lesser included offense of the misdemeanor of failing to file a currency disclosure report that is required when more than $5,000 is transported into or out of the United States (31 U.S.C. (1976 ed.) 1058 and 1101).

2. Whether, if the false statement felony under 18 U.S.C. 1001 is included within the currency reporting misdemeanor under 31 U.S.C. (1976 ed.) 1058 and 1101, the court of appeals erred in concluding that it was required to vacate the Section 1001 felony conviction as the lesser included offense that merged into the Section 1101 misdemeanor conviction.

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES NOEL WOODWARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (App., *infra*, 1a-19a) is unreported. An order of the court of appeals modifying that opinion and denying a petition for rehearing (App., *infra*, 20a-22a) is unreported. The opinion of the court of appeals as modified is reported at 726 F.2d 1320.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1983. A petition for rehearing was denied on

February 29, 1984 (App., *infra*, 20a). On April 19, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 1001 provides.

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. 31 U.S.C. (1976 ed.) 1101 provides:

> (a) **Persons required to file**
>
> Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—
>
> (1) transports or causes to be transported monetary instruments—
>
> (A) from any place within the United States to or through any place outside the United States, or
>
> (B) to any place within the United States from or through any place outside the United States, or
>
> (2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) **Contents of filed report**

Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) **Common carriers**

Subsection (a) of this section does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

3. 31 U.S.C. (1976 ed.) 1058 provides:

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both.

4. 31 U.S.C. (1976 ed.) 1052(k) provides:

> For the purposes of section 1001 of title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent was convicted of making a false written statement on a United States Customs form that he had not transported more than $5,000 into the United States, in violation of 18 U.S.C. 1001, and failing to file a report disclosing that he and his wife were transporting approximately $22,000 into the United States, in violation of 31 U.S.C. (1976 ed.) 1058 and 1101.[1] He was sentenced to a term of six month's imprisonment on the false statement count under Section 1001 and a consecutive three-year term of probation on the currency reporting count under Section 1101.[2] The court of appeals reversed the Section 1001 conviction and affirmed the Section 1101 conviction (App., *infra*, 1a-19a).[3]

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[1] 31 U.S.C. (1976 ed.) 1058 and 1101 were recently recodified without substantive change (see pages 13-14 & note 9, *infra*) at 31 U.S.C. 5322(a) and 5316. See Pub. L. No. 97-258, 96 Stat. 877 *et seq.* (1982).

[2] The district court also required that respondent inform future employers of his criminal record, but the court of appeals set aside that portion of the sentence (App., *infra*, 18a n.15).

[3] Respondent was initially indicted with his wife. The charges against Mrs. Woodward were subsequently dismissed on the government's motion, and a superseding indictment was returned against respondent alone.

1. The evidence at trial showed that on March 1, 1980, respondent and his wife arrived at Los Angeles International Airport on a flight from Brazil. In proceeding through Customs for entry into the United States, respondent filled out Customs Form 6059-B. That form, after requesting the declarant's name, address, nationality, and the identities of any accompanying family members, asks the declarant to answer "yes" or "no" to the following question: "Are you or any family member carrying over $5000.00 (or the equivalent value in any currency) in monetary instruments such as coin, currency, traveler's checks, money orders, or negotiable instruments in bearer form?" Immediately following that question, the form states, in italics, that "[*i*]*f yes, you must file a report on Form 4790, as required by law*"; it then advises: "Note: It is not illegal to transport over $5000 in monetary instruments; however, it must be reported." In addition, placards prominently displayed in the passenger area at Los Angeles International Airport inform travelers that they are required to file a report with Customs if they are carrying more than $5,000 into the country. Finally, Form 6059-B warns, in bold black type, that "False Statements Made To A Customs Officer Are Punishable By Law." Tr. 126-128, 140, 143, 145, 167-170; GX 1.

In completing Customs Form 6059-B, respondent indicated that he was a resident and citizen of the United States and that he was accompanied by his wife. He also checked the "no" box described above, thereby stating that neither he nor any family member was carrying more than $5,000; respondent neither requested nor filled out Form 4790 to report the approximately $22,000 that he and his wife were bringing into the

United States, and he did not otherwise declare that money. Respondent then signed the form in the designated space below the legend: "*I certify that I have declared all items acquired abroad as required herein and that all oral and written statements which I have made are true, correct and complete*" (emphasis in original).

After respondent submitted Form 6059-B, he was questioned for a few minutes by Customs officials, but at no time did he state that he had more than $5,000 or ask for a copy of Form 4790 (Tr. 134-135). Customs officials decided to search respondent and his wife.[4] As respondent was being escorted to a search room, he told a Customs official that he and his wife were carrying in excess of $20,000 (Tr. 136). Respondent later repeated that statement and, when asked why he had indicated on Form 6059-B that he did not have more than $5,000, he explained that the money was the proceeds of an insurance settlement and that he believed he did not have to disclose such funds (Tr. 144, 148). Respondent then produced approximately $12,000 in $100 bills that had been hidden in his boot (Tr. 136). In addition, approximately $10,000 in $100 bills was found in a makeshift money belt concealed under Mrs. Woodward's clothing (Tr. 153). Respondent thereafter reiterated that he had not reported the cash because it came from an insurance settlement and thus was not "personal" money that was subject to disclosure (Tr. 157-158); respondent admitted, however, that he was familiar with United

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[4] While respondent was being processed through Customs, it was determined that he was a fugitive from prosecution in Greece (C.A. Excerpt of Record IV; App., *infra*, 2a). In addition, Customs officials noticed an "unnatural-looking bulge" under Mrs. Woodward's clothing (Tr. 42; App., *infra*, 2a).

States Customs currency laws (Tr. 156-157)[5] and that he had discussed the money with an unnamed United States Embassy official in Belgium and been told to "report everything to U.S. Customs" (Tr. 158).

After Customs retained all but approximately $1,500 of the unreported money pending forfeiture proceedings (see 31 U.S.C. (1976 ed.) 1102(a)), respondent sought remission of the impounded funds (see 31 U.S.C. (1976 ed.) 1104). In connection with that effort, respondent made an appointment to meet with Customs officials at his residence in late March 1980. At that meeting respondent stated that approximately $18,000 represented an insurance settlement for a burglary that occurred in Belgium. Although acknowledging that he had completed Customs declarations on a number of previous occasions, respondent said that he thought the insurance money did not have to be reported because, although belonging to him, it was "separate." Respondent also said that an unidentified official in the United States Embassy in Brussels had advised him that insurance proceeds should be orally declared (Tr. 164-178). Nine months later, in December 1980, respondent contacted the Assistant United States Attorney involved in the forfeiture proceeding and said that he had been told by an unnamed official in the United States Embassy in Johannesburg, South Africa, that insurance money could be declared orally (Tr. 193-195). App., *infra*, 3a-4a.

2. In the district court respondent raised no issue concerning the interrelationship of the false statement

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[5] Insurance proceeds are not exempt from Customs declarations, and nothing to indicate any such exemption appears on the Customs forms (Tr. 145).

felony (18 U.S.C. 1001) and the currency reporting misdemeanor (31 U.S.C. (1976 ed.) 1058 and 1101) on which he was tried. Likewise, he presented no such issue in his brief on appeal. However, the court of appeals, acting sua sponte, ordered the parties to brief the questions "[w]hether the evidence was sufficient to establish the elements of an offense under 18 U.S.C. § 1001" and "[w]hether [respondent's] convictions under 31 U.S.C. §§ 1058, 1059 & 1101, and 18 U.S.C. § 1001 violate the prohibition against double jeopardy" (App., *infra*, 23a).

Following supplemental briefing, the court of appeals affirmed respondent's conviction on the currency reporting misdemeanor and reversed his conviction on the false statement felony (App., *infra*, 1a-19a). The court characterized the indictment as charging respondent "with two separate offenses based on the exact same conduct: His false declaration that he was not carrying over $5,000 in United States currency" (*id.* at 4a (footnote omitted)). Applying the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court concluded that a "conviction under 31 U.S.C. § 1058 necessarily entails proof of all of these elements [of a violation of 18 U.S.C. 1001]" (App., *infra*, 9a) and thus that "18 U.S.C. § 1001 is an included offense within a conviction under 31 U.S.C. § 1058 * * * [and] § 1101" (*id.* at 13a-14a (footnote omitted)).

In reaching this conclusion, the court reasoned that "a willful failure to file" a currency disclosure report is a "form of 'concealment'" under the false statement statute (App., *infra*, 10a) even in the absence of "some affirmative misrepresentation" (*id.* at 9a), and therefore that "18 U.S.C. § 1001 could be applied to punish a traveler who willfully fails to file a report listing cur-

rency in excess of $5,000. It follows that a conviction under 31 U.S.C. § 1058 [and § 1101] necessarily includes all elements of an 18 U.S.C. §1001 violation" (*id.* at 10a). In addition, the court found no "'clear indication' of congressional intent to allow cumulative punishment under both statutory sections" (*id.* at 11a). Accordingly, the court held that "the failure to report currency in excess of $5,000 upon entry into or departure from the United States * * * constitute[s] only a single offense" (*id.* at 13a), and hence "double punishments [cannot be imposed] under 18 U.S.C. § 1001 and 31 U.S.C. § 1058 [and § 1101]" (*id.* at 12a). Although recognizing "that a certain degree of incongruity inheres in the notion that 18 U.S.C. § 1001, which carries a maximum penalty of five years in prison and $10,000 fine, is 'included' within 31 U.S.C. § 1058 [and § 1101], which carries a maximum penalty of one year in prison and a $1,000 fine" (*id.* at 14a n.11), the court "stress[ed] * * * that [it was] merely following the presumed intent of Congress" (*ibid.*).

Based on its view that the violation of 18 U.S.C. 1001 is an "included offense" (App., *infra*, 13a) of the conviction under 31 U.S.C. (1976 ed.) 1058 and 1101, the court of appeals set aside the false statement felony conviction and upheld the currency reporting misdemeanor conviction. It explained that this disposition "flows from the general rule that a conviction for a lesser included offense merges into a conviction for the greater offense" (*id.* at 14a (footnote omitted)). The court specifically declined to leave standing the conviction for the "'more serious'" offense, concluding instead that "the 'greater' as opposed to the 'lesser included' offense" should survive (*id.* at 14a n.12).

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the felony of making a false statement (18 U.S.C. 1001) is a lesser included offense of the misdemeanor of failing to file a currency disclosure report (31 U.S.C. (1976 ed.) 1058 and 1101). This holding is implausible on its face and is inconsistent with settled principles established by this Court to determine whether conduct violating two statutory provisions constitutes only a single offense and thus is not subject to cumulative punishment. It also rests upon an unduly broad reading of Section 1001 that invites future felony prosecutions in cases that we believe the statute does not reach. Furthermore, even if the court were otherwise correct, its disposition of the case, by vacating the felony false statement conviction and leaving in place the midsemeanor currency reporting conviction, is entirely insupportable and contradicts both common sense and recognized legal principles. Finally, the decision below creates a conflict among the circuits. Accordingly, review by this Court is warranted. Because the court of appeals' rulings are so plainly in error and at odds with the decisions of this and other courts, the Court may wish to consider summary reversal.

1. a. In *Albernaz* v. *United States*, 450 U.S. 333 (1981), this Court recently elaborated the principles of interpretation to be followed in determining whether two statutes establish separate offenses that may be cumulatively punished. See also *Missouri* v. *Hunter*, No. 81-1214 (Jan. 19, 1983). Here, as in *Albernaz*, the statutes at issue prescribe "separate offenses with separate penalty provisions that are contained in distinct * * * [parts of the United States Code]. The provisions are

unambiguous on their face and each authorizes punishment for a violation of its terms" (450 U.S. at 336). As the Fifth Circuit concluded in *United States* v. *Anderez*, 661 F.2d 404, 406 (1981), 18 U.S.C. 1001 and 31 U.S.C. (1976 ed.) 1101 represent "two separate offenses contained in two distinct acts. Each provision is unambiguous on its face and imposes punishment for the violation of its distinct terms."

Furthermore, like the statutes in *Albernaz*, the false statement and currency reporting statutes satisfy the "'rule of statutory construction'" of *Blockburger* v. *United States*, 284 U.S. 299 (1932), that "is to be used 'to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively'" (*Albernaz*, 450 U.S. at 337, quoting *Whalen* v. *United States*, 445 U.S. 684, 691 (1980)). Under *Blockburger*,

> [t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Albernaz, 450 U.S. at 337, quoting *Blockburger*, 284 U.S. at 304. Here, 18 U.S.C. 1001 and 31 U.S.C. (1976 ed.) 1101 each requires proof of a fact that the other does not. The crux of Section 1001 is the making of a false statement, but such a statement is not an element of the Section 1101 offense. Conversely, Section 1101—but not Section 1001—involves the failure to file a currency disclosure report required by law. It simply blinks reality to conclude, as the court of appeals did, that making a false statement is a lesser included of-

fense of failing to submit a required report and thus, in effect, that the failure to file is an enhanced or aggravated form of false statement.[6] It is therefore clear, as the Fifth Circuit has recognized, that Section 1001 and Section 1101 meet the *Blockburger* standard. See *United States* v. *Anderez*, 661 F.2d at 407, 408 n.12.[7]

In addition, as in *Albernaz*, there is no "clear indication" (450 U.S. at 340) in the legislative history of the statutes—indeed, there is no indication at all—that, contrary to the presumption that cumulative punishments are authorized for separate offenses under *Blockburger*, Congress intended that consecutive penalties not be imposed pursuant to Section 1001 and Sections 1058 and 1101. See *United States* v. *Anderez*, 661 F.2d at 407-408 & n.12; compare App., *infra*, 13a n.10.

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[6] This point is discussed more fully at pages 17-19, *infra*.

[7] Justice Rehnquist also recently concluded that Section 1001 and Section 1101 satisfy the *Blockburger* test. In *Julian* v. *United States*, 685 F.2d 448 (1982) (Table), a divided panel of the Ninth Circuit (Fletcher, J., dissenting) held in an unpublished opinion that, contrary to its later decision in the present case, Section 1001 and Section 1101 involve separate offenses for which cumulative penalties are authorized. In denying Julian's application for bail, Justice Rehnquist explained (103 S. Ct. 3522 (1983)):

> [Julian] contends that a conviction under both 18 U.S.C. § 1001 and 31 U.S.C. § 1101 violates the Double Jeopardy Clause. But under the test established in Blockburger v. United States, 284 U.S. 299, 304 (1932), cumulative punishments under separate statutes are permitted provided only that each statute requires proof of a fact not required by the other. 18 U.S.C. § 1001 requires a finding that applicant misled a government official by material false statements. 31 U.S.C. § 1001 requires a different finding that applicant failed to file the required currency reporting form. Thus, the Blockburger test is satisfied.

The Court subsequently denied Julian's petition for certiorari, No. 82-6413 (Oct. 3, 1983).

In fact, the language and history of the currency reporting statute—which was enacted and recodified subsequent to the false statement statute—indicate that Congress contemplated the applicability of both provisions and did not preclude aggregate sentences. Section 1101 is part of the Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, Tit. II, 84 Stat. 1118 *et seq.*[8] In 31 U.S.C. (1976 ed.) 1052(k), the Act expressly provided:

> For the purposes of section 1001 of title 18, the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

Hence, in passing 31 U.S.C. (1976 ed.) 1101, Congress's attention was drawn to the application of 18 U.S.C. 1001, yet nowhere did it suggest that the two statutes could not be invoked together. For this reason, the natural inference is that Congress did not intend to restrict the application of Section 1001. See *United States* v. *Grotke*, 702 F.2d 49, 54 (2d Cir. 1983); *United States* v. *Anderez*, 661 F.2d at 406; *United States* v. *Fitzgibbon*, 576 F.2d 279, 283 (10th Cir.), cert. denied, 439 U.S. 910 (1978). This understanding is confirmed by the 1982 recodification of Title 31. This recodification, which was "without substantive change,"[9] deleted Section 1052(k)

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[8] In turn, the Currency and Foreign Transactions Reporting Act is part of the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 *et seq.*

[9] H.R. Rep. 97-651, 97th Cong., 2d Sess. 1 (1982). See also *id.* at 3; 128 Cong. Rec. H5386 (daily ed. Aug. 9, 1982) (remarks of Rep. Hall); *id.* at H5452 (remarks of Rep. Hall); *id.* at H5454 (remarks of Rep. Fish).

(see H.R. Rep. 97-651, 97th Cong., 2d Sess. 251 (1982)) as "[u]nnecessary" because "Section 1001 [of Title 18] *applies unless otherwise provided*" (*id.* at 301 (emphasis added)). Thus, the 1982 legislative history makes clear that 18 U.S.C. 1001 remains fully applicable to false statements made in the course of currency transportation offenses and was not intended to be limited by the currency reporting statute.[10]

Finally, the statutes involved in this case, like those in *Albernaz* (450 U.S. at 343), serve different congressional policies and are directed at different misconduct. The false statement statute was designed "'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described'" (*United States* v. *Rodgers*, No. 83-620 (Apr. 30, 1984), slip op. 5, quoting *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941)) and hence to ensure "'the integrity of official inquiries'" (*Rodgers*, slip op. 6, quoting *Bryson* v. *United States*, 396 U.S. 64, 70 (1969)). In this case respondent was indicted and convicted under 18 U.S.C. 1001 for the false written statement he made on Customs Form 6059-B. On the other hand, the currency statute was intended to require the preparation and submission of reports that "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings" (31 U.S.C. (1976 ed.) 1051); as this Court has explained:

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[10] Moreover, to our knowledge, no felony has ever been regarded as a lesser included offense of a misdemeanor. Even apart from the *Blockburger* analysis and the history of the Currency Reporting Act, it is most improbable that Congress intended a Section 1001 felony to be punished only as a misdemeanor on the theory that it is included within the Section 1101 offense.

> [The Bank Secrecy Act, which contained the currency reporting provisions,] was enacted by Congress in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability.
>
> * * * * *
>
> The legislative history of [the currency] reporting provisions indicates that the Congress was concerned with the circumvention of United States regulatory, tax, and criminal laws which United States citizens and residents were accomplishing through the medium of secret foreign bank transactions.

California Bankers Ass'n v. *Shultz*, 416 U.S. 21, 26, 35 (1974). Thus, the currency statute seeks "the acquisition of information to assist in the enforcement" of criminal and civil laws (*id.* at 76).[11] Here, respondent violated Section 1101 by transporting more than $5,000 into the country without filing the required currency disclosure report. The fact that lying to a government official and refusing to provide required information are different acts of misconduct (see *United States* v. *Anderez*, 661 F.2d at 407) and interfere with government operations in different ways "reinforce[s]" (*Albernaz*, 450 U.S. at 343) the conclusion that making a false statement, in violation of Section 1001, is not a lesser included offense of failing to file a currency disclosure report under Section 1101.

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[11] See also, *e.g.*, S. Rep. 91-1139, 91st Cong., 2d Sess. 1, 3-4, 6-8 (1970); *Foreign Bank Secrecy: Hearings on S. 3678 and H.R. 15073 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 253 (1970); *Foreign Bank Secrecy and Bank Records: Hearings on H.R. 15073 Before the House Comm. on Banking and Currency*, 91st Cong., 1st & 2d Sess. 92, 97-98, 104 (1969-1970).

In the specific factual context of this case, the currency offense and the false statement offense were part of a single transaction in which respondent sought to bring currency into the country without disclosing his action to the government. Indeed, most cases in which people entering the United States through a Customs port of entry seek to bring undeclared currency with them will involve a coincidence of the two offenses, since standard Customs forms require the making of a statement with respect to currency transportation. It is perhaps this attribute of the particular facts of this case that moved the court of appeals to treat the two statutes as covering the "same" offense for *Blockburger* purposes. But the fallacy of the court's approach becomes readily evident when the full reach of the currency statute is examined. That statute is designed to reach all undeclared international currency transactions in excess of $5,000. It thus applies equally not only to persons entering at a Customs port of entry, but also to persons leaving the country or sneaking into the country, who would not ordinarily be called upon to make any statement to the government and therefore would have no exposure to liability under Section 1001. Thus, in many instances proscribed under Section 1101, the violator will have made no statement of any kind to the government, nor engaged in any affirmative scheme of concealment; it is accordingly plain that acts or omissions violating the false statement statute cannot be a necessary element of the currency offense despite the contemporaneity of the two infractions on the particular facts of this case.

For these reasons, as the Fifth Circuit held in *United States* v. *Anderez*, a defendant "may be convicted un-

der both 18 U.S.C. § 1001 and 31 U.S.C. §§ 1101, 1058" (661 F.2d at 408 (footnote omitted)).

b. In reaching its holding that 18 U.S.C. 1001 is a lesser included offense of 31 U.S.C. (1976 ed.) 1058 and 1101, the court of appeals reasoned that Section 1001 does not require "some affirmative misrepresentation" (App., *infra*, 9a) but instead can be violated by the "concealment" entailed in merely failing to file a required currency disclosure report (*id.* at 10a). This analysis is erroneous and conflicts with decisions in other circuits.

Section 1001 applies, inter alia, to any person who "knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact" in a matter within the jurisdiction of a department or agency of the United States (18 U.S.C. 1001). The court of appeals' conclusion that a simple failure to file "is a form of 'concealment'" under Section 1001 (App., *infra*, 10a) entirely ignores the requirement that there be a "trick, scheme, or device" that conceals a material fact. Merely failing to file does not violate the false statement statute. See *United States* v. *Anderez*, 661 F.2d at 408 n.12; compare App., *infra*, 9a-10a n.8.

Contrary to the decision below, other courts of appeals have held that a simple failure to disclose does not constitute "conceal[ment] * * * by * * * trick, scheme, or device" under 18 U.S.C. 1001. For example, in *United States* v. *London*, 550 F.2d 206 (5th Cir. 1977), the court concluded that Section 1001 requires "an affirmative act" and does not "embrace mere nondisclosure" (550 F.2d at 212); as the court explained (550 F.2d at 213-214 (footnote omitted)):

> We therefore conclude that full effect must be given to the "trick, scheme, or device" language of the first clause of § 1001 and that this language implies the requirement of an affirmative act by which means a material fact is concealed.
>
> * * * * *
>
> [The government] ha[s] the burden of demonstrating not merely that * * * [a defendant] passively failed to [make a required] disclos[ure] * * *, but rather that [the defendant] committed affirmative acts constituting a trick, scheme or device by which [he] sought to conceal material facts.
>
> * * * * *
>
> [T]he mere omission of failing truthfully to disclose a material fact, which is simply the negative aspect of the affirmative act of falsely stating the same material fact, does not make out an offense under the conceal or cover up clause of § 1001. Rather, the latter clause of § 1001 requires the government to prove something more—that the material fact was affirmatively concealed by ruse or artifice, by scheme or device.

See also, *e.g.*, *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096, 1098, 1101 (11th Cir. 1983); *United States* v. *Irwin*, 654 F.2d 671, 678 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Diogo*, 320 F.2d 898, 902, 905 (2d Cir. 1963).[12] By erroneously broadening the scope of Section 1001 to reach any failure to make a required report, the court of appeals has not only excused respondent from the full consequences of his unlawful conduct in this case, but also jeopardized the interests of future criminal defendants by inviting Section 1001 prosecutions on a seemingly unsustainable basis.

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[12] The cases cited by the court below (App., *infra*, 10a & n.8) do not support a contrary conclusion. In *United States* v. *Hajecate*, 683 F.2d 894 (5th Cir. 1982), the "falsification and

In addition to its erroneous legal analysis, the court of appeals also misconceived the nature of the issue presented here. The question in this case is not whether respondent's failure to file a currency disclosure report is a "concealment" that could be charged under 18 U.S.C. 1001 and, if so, whether he could be punished for that act under both Section 1001 and 31 U.S.C. (1976 ed.) 1058 and 1101.[13] Rather, respondent was prosecuted under Section 1001 for his false written statement on Customs Form 6059-B, and the issue is whether such conduct is removed from the scope of that statute by the fact that respondent was also prosecuted, under Sections 1058 and 1101, for transporting currency into the United States without filing a currency disclosure report. The court of appeals' analysis of the failure to file as "concealment," and its conclusion that a Section 1001 violation based on such failure is a lesser included offense of a Section 1101 violation, is simply beside the point in resolving the question raised here: whether respondent was subject both to Section 1001 for making a false statement and to Sections 1058 and 1101 for failing to file a currency report. For the

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concealment" referred to by the court (683 F.2d at 899) involved affirmative false statements on tax returns and not simply the failure to file a return. Likewise, the Ninth Circuit's own decisions in *United States* v. *Masters*, 612 F.2d 1117 (1979), cert. denied, 449 U.S. 847 (1980), and *United States* v. *UCO Oil Co.*, 546 F.2d 833 (1976), cert. denied, 430 U.S. 966 (1977), also pertained to concealment involving affirmative misstatements rather than mere nondisclosure.

[13] Even in that situation, however, the felony under Section 1001 would not be a lesser included offense of the misdemeanor under Sections 1058 and 1101; instead, because the Section 1001 offense requires both a "concealment" and a "trick, scheme, or device," it is clearly not subsumed within the Section 1101 offense.

reasons already stated, the court of appeals plainly erred in holding that he was not.

2. If, contrary to the above argument, respondent could not be sentenced under both provisions, we submit that the court of appeals erred in setting aside the felony false statement count rather than the misdemeanor currency reporting count. The court's disposition reflects its view that, because the Section 1001 felony is the lesser included offense and therefore merges into the Section 1101 misdemeanor, the Section 1001 count must be vacated. Such a wooden and formalistic theory is unprecedented and conflicts with decisions in other circuits. Moreover, it confers an unjustifiable windfall upon defendants like respondent who, despite being convicted of a Section 1001 felony, can be sentenced only for a misdemeanor.

Contrary to the decision below, every other court of appeals to consider the issue has concluded that, where the greater sentence is imposed on what is technically the lesser included offense, that sentence can be upheld and need not be vacated in favor of the sentence on the more inclusive offense.[14] As these courts have pointed out, the defendant's "'only justifiable complaint * * * was that he received two consecutive sentences for one offense, instead of a single sentence'" (*Holbrook* v. *United States*, 136 F.2d 649, 651 (8th Cir. 1943), quoting *Holiday* v. *United States*, 130 F.2d 988, 989 (8th Cir. 1942)), and he has no "right to say which of the two consecutive sentences * * * contemporane-

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[14] See *United States* v. *Corson*, 449 F.2d 544, 547-551 (3rd Cir. 1971) (en banc), overruled on other grounds, *United States* v. *Busic*, 639 F.2d 940, 953 (3d Cir.), cert. denied, 452 U.S. 918 (1981); *United States* v. *Ivy*, 644 F.2d 479, 480 (5th Cir. 1981); *United States* v. *Larson*, 625 F.2d 67, 69 (5th Cir. 1980); *United*

ously imposed * * * shall be eliminated in order not to subject the defendant to the possibility of double punishment" (*Holbrook* v. *United States*, 136 F.2d at 652). In these circumstances, "no sound legal reason exists why the longer sentence cannot properly be made to constitute the real punishment for the offense" (*ibid.*), and "'[j]ustice and common sense alike would appear to require that [the more severe sentence] be upheld'" (*Coy* v. *United States*, 156 F.2d 293, 295 (6th Cir.), cert. denied, 328 U.S. 841 (1946), quoting *Coy* v. *Johnston*, 136 F.2d 818, 821 (9th Cir.), cert. denied, 320 U.S. 788 (1943)). Indeed, a contrary rule would be "inconsistent with sound judicial policy" (*United States* v. *Corson*, 449 F.2d 544, 549 (3d Cir. 1971) (en banc),

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States v. *Bennett*, 547 F.2d 1235 (5th Cir.), cert. denied, 431 U.S. 943 (1977); *Homan* v. *United States*, 464 F.2d 555 (5th Cir. 1972); *Thomas* v. *United States*, 450 F.2d 317, 319 (5th Cir. 1971), cert. denied, 409 U.S. 859 (1972); *United States* v. *White*, 440 F.2d 978, 981 (5th Cir.), cert. denied, 404 U.S. 839 (1971); *Counts* v. *United States*, 263 F.2d 603 (5th Cir. 1959); *Coy* v. *United States*, 156 F.2d 293, 295 (6th Cir.), cert. denied, 328 U.S. 841 (1946); *United States* v. *Martin*, No. 83-1017 (7th Cir. Apr. 19, 1984); *United States* v. *Leather*, 271 F.2d 80 (7th Cir. 1959), cert. denied, 363 U.S. 831 (1960); *Gerberding* v. *United States*, 471 F.2d 55, 61-63 (8th Cir. 1973); *Sawyer* v. *United States*, 312 F.2d 24 (8th Cir.), cert. denied, 374 U.S. 837 (1963); *Hardy* v. *United States*, 292 F.2d 192 (8th Cir. 1961); *Holbrook* v. *United States*, 136 F.2d 649 (8th Cir. 1943); *Purdom* v. *United States*, 249 F.2d 822 (10th Cir. 1957), cert. denied, 355 U.S. 913 (1958); *United States* v. *Stone*, 702 F.2d 1333, 1335, 1340-1341 (11th Cir. 1983); *United States* v. *Girst*, 645 F.2d 1014, 1017 (D.C. Cir. 1979); see also *United States* v. *Wiga*, 662 F.2d 1325, 1335-1336 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982); *Coy* v. *Johnston*, 136 F.2d 818 (9th Cir.), cert. denied, 320 U.S. 788 (1943); cf. *Green* v. *United States*, 365 U.S. 301, 305-306 (1961) (plurality opinion).

overruled on other grounds, *United States* v. *Busic*, 639 F.2d 940, 953 (3d Cir.), cert. denied, 452 U.S. 918 (1981)) by allowing "the defendant to escape the heavier penalty" (*Sawyer* v. *United States*, 312 F.2d 24, 27 (8th Cir.), cert. denied, 374 U.S. 837 (1963)). The decision below conflicts with this line of authority and ignores the salutary principles to which other circuits have consistently adhered.

In addition, the court of appeals' decision in this case is at odds with fundamental principles of prosecutorial discretion. As the Court recently explained in *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979) (citations omitted):

> This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.

The Court expressly rejected the contention that a different rule applies in cases involving "overlapping statutes with identical standards of proof" (442 U.S. at 124), concluding that "there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements" (442 U.S. at 125). And *Batchelder* recognizes that "a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution * * * [or] to choose the penalty scheme under which he will be sentenced" (*ibid.*). See also, *e.g.*, *Berra* v. *United States*,

351 U.S. 131, 135 (1956); *United States* v. *Gilliland*, 312 U.S. 86, 95-96 (1941). These principles are equally applicable to the issue in this case, and thus, contrary to the technical and inflexible rule formulated by the court below, the prosecutor has discretion to select the counts that should remain in effect after the defendant has been tried and convicted of greater and lesser offenses.

In *United States* v. *Duncan*, 693 F.2d 971, 975 (1982), the Ninth Circuit, in accord with the decisions in other circuits,[15] held that 18 U.S.C. 1001 is not rendered inapplicable by the more specific provisions of 31 U.S.C. (1976 ed.) 1058 and 1101 and therefore that a defendant who makes a false statement in connection with the transportation of unreported currency can be indicted and sentenced under Section 1001.[16] In light of *Duncan*, it is unquestionable that, in the exercise of prosecutorial discretion, respondent's false statement could have been prosecuted and punished in a single count under the felony provision of 18 U.S.C. 1001. The fact that a second count was also brought under Section 1101 for respondent's failure to file a currency disclo-

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[15] See *United States* v. *Grotke*, 702 F.2d 49, 54 (2d Cir. 1983); *United States* v. *Anderez*, 661 F.2d 404, 406-408 (5th Cir. 1981); *United States* v. *Fitzgibbon*, 576 F.2d 279, 283 (10th Cir.), cert. denied, 439 U.S. 910 (1978); compare *United States* v. *Duncan*, 693 F.2d at 980 (Fletcher, J., dissenting).

[16] Indeed, *Duncan recognized that where "a course of criminal conduct * * * entail[s] the violation of several statutes * * * [that] are not redundant, the prosecutor may charge the defendant with violating one or all of the statutes, and the defendant can be convicted of violating more than one statute"* (693 F.2d at 975 (footnote omitted)). The court cited 18 U.S.C. 1001 and 31 U.S.C. (1976 ed.) 1101 as an example of that princi-

sure report should not immunize him from Section 1001 or divest the prosecutor of discretion to choose the statutory penalty to which respondent will be subject. The court of appeals' decision erects an artificial distinction between defendants who are prosecuted under Section 1001 alone and those prosecuted under both provisions, and it improperly restricts and intrudes upon the discretion of the Executive Branch to control the charges against defendants.[17]

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ple, and it expressly noted that "31 U.S.C. §§ 1058 and 1101 and 18 U.S.C. § 1001 are not the same [offense]" (693 F.2d at 975 n.4.).

[17] The principal issue here is whether, as the court below held, there is a rule of law that requires the sentence on the lesser included offense to be vacated even though it exceeds the sentence on the "greater" offense. We recognize that other courts, in rejecting that proposition, have left the selection of the surviving counts to the discretion of the district judge (see cases cited in note 14, *supra*). But in general the courts have simply assumed that this is the responsibility of the judge and have not considered the role of the prosecutor and the doctrine of prosecutorial discretion. Nor can it be concluded, as the court asserted in *United States* v. *Wiga*, 662 F.2d at 1335, that there is a categorical distinction between the choice of charges to be brought in the first instance and the election of the surviving charges following conviction on greater and lesser offenses, and that prosecutorial discretion is confined to or exhausted by the initial bringing of charges. There is no reason of logic or policy that we can discern to support such a result. Of course, even under our view the district court remains free to impose the sentence that it considers to be appropriate, but that sentence should be pursuant to the charges designated by the prosecutor.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

VINCENT L. GAMBALE
Attorney

MAY 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1140

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CHARLES NOEL WOODWARD,
DEFENDANT-APPELLANT

Aug. 5, 1983

Appeal from the United States District Court for the Central District of California.

Before KASHIWA,* Court of Claims Judge, FLETCHER, and NORRIS, Circuit Judges.

FLETCHER, Circuit Judge:

Woodward appeals from a conviction on two counts for failing to report approximately $22,000 in United States currency he was carrying as he entered the country. We affirm his conviction under 31 U.S.C. § 1058 (1976), the second count, but reverse his convic-

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*The Honorable Shiro Kashiwa, Associate Judge, U.S. Court of Claims, sitting by designation.

tion under 18 U.S.C. § 1001 (1976), the first count, because we conclude that the section 1001 offense merges into the section 1058 conviction pursuant to the statutory interpetation rule of *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

FACTS

On March 1, 1980, Charles Noel Woodward, the defendant and appellant, arrived with his wife Diane at Los Angeles International Airport on an incoming flight from Brazil. Woodward filed a U.S. Customs declaration form on which he stated that neither he nor any member of his family was carrying monetary instruments in excess of $5,000 into the United States. Under 31 U.S.C. § 1101 (1976), Woodward was required to report any such currency in excess of $5,000.

While the Woodwards were being processed through customs, Customs inspectors determined that Woodward was a fugitive from prosecution in Greece. The inspectors also noticed an unnatural-looking bulge under Diane Woodward's clothing. When they told Woodward that his wife would be taken to a private room for a secondary search, Woodward admitted that he and his wife were carrying about $22,000 in unreported United States currency. A subsequent search of Diane Woodward revealed $10,000 in $100 denomination bills concealed in a money belt secured about her waist. Charles Woodward produced approximately $12,000, which he had hidden in his boot.

Following the discovery of the money, Woodward was interviewed by Customs agents Donald Shruhan and Robert Olson in a small search room at the airport. The agents asked Woodward to explain the circum-

stances surrounding his transportation of the unreported currency. Woodward told him that the money came from an insurance settlement relating to a burglary he had suffered while in Belgium. During this interview, Woodward also said that while he was in Belgium, an unidentified person at the U.S. Embassy had informed him that he was required to declare the currency to customs officials. But Woodward added that he did not report the currency because he thought that the requirement applied only to "personal money," and that "insurance money" was separate.

Following the interview, which according to Agent Olson lasted between fifteen and twenty minutes, Woodward was permitted to leave the airport. Customs officials retained all but $1,560 of the unreported funds, however, pending forfeiture proceedings pursuant to 31 U.S.C. § 1102(a)(1976). Later, Woodward undertook a series of efforts to obtain remission of the seized funds, pursuant to the authority of 31 U.S.C. § 1104 (1976). He wrote to the Director of Customs, and on March 27, 1980, he met with two customs agents in his apartment. In November, 1980, Woodward visited the office of Ronald Edelstein, Chief of Fines, Penalties, and Forfeitures for the Customs Service, in San Pedro, California. Edelstein advised Woodward to contact Assistant United States Attorney Steven Petersen in Los Angeles to obtain information about the status of his case.

On December 11, Woodward met with Petersen in Petersen's office. Woodward volunteered the entire story of the unreported currency. In contrast to the story Woodward told the customs investigators at the airport, however, Woodward told Petersen that he did

not declare the currency on the form because a vice-consul in South Africa had told him that insurance proceeds could be declared orally.

At no time during his airport detention and interrogation or subsequent conversations with Government officials was Woodward informed that he could be subject to criminal prosecution and that any statement he made could be used against him in such a proceeding. Yet the Justice Department on December 16, 1980 filed a two-count indictment charging Woodward with violating 18 U.S.C. § 1001 and 31 U.S.C. § 1101 by failing to declare the currency in excess of $5,000 that he was carrying. At trial, the Government relied upon the inconsistencies among Woodward's statements to help establish that he had known of the reporting requirement.

Woodward was convicted on both counts. On the 18 U.S.C. § 1001 count, he was sentenced to six months in prison; on the 31 U.S.C. § 1058 count (which punishes violations of 31 U.S.C. § 1101 (1976)), he received a consecutive sentence of three years of probation. Also, Woodward was ordered to inform any future employer of this criminal record. From these convictions, Woodward now appeals.

I

Merger of 18 U.S.C. § 1001 and 31 U.S.C. § 1058.

The two counts of Woodward's indictment charged him with two separate offenses based on the exact same conduct: His false declaration that he was not carrying over $5,000 in United States currency.[1] The first count

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[1] Count One alleged that

> On or about March 1, 1980, in Los Angeles County, within the Central District of California, defendant CHARLES NOEL WOODWARD knowingly and willfully

charged that Woodward had willfully made a false statement to the Government when he submitted the false Customs declaration, in violation of 18 U.S.C. § 1001, the statute that punishes fraud against the United States Government. The second in effect alleged that the submission of the false declaration violated the currency reporting statute, 31 U.S.C. § 1101, and was therefore punishable under 31 U.S.C. § 1058, which provides criminal sanctions for such violations. Due to the unusual combination of criminal charges pressed against Woodward stemming from the same overt act, we withdrew the case from submission and requested additional briefs in order to consider two questions: (1) whether 18 U.S.C. § 1001 can properly be applied to convict a traveler who violates the currency reporting statute, and (2) if so, whether a defendant can be

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made a false, fictitious and fraudulent statement and representation as to material facts in a matter within the jurisdiction of the United States Customs Service, an agency of the United States, in that defendant CHARLES NOEL WOODWARD filed United States Customs Form 6059-B with officials of the United States Customs Service on which form he indicated that neither he nor any member of his family was carrying monetary instruments in excess of $5,000.00 into the United States, whereas in truth and fact as defendant CHARLES NOEL WOODWARD then and there well knew, he was carrying monetary instruments in excess of $5,000.00 that is, over $11,000.00 in cash, and his wife Diane Vee Woodward was carrying monetary instruments in excess of $5,000.00, to wit, $10,000.00 in cash.

Count Two alleged that

> On or about March 1, 1980, in Los Angeles County, within the Central District of California, defendant CHARLES NOEL WOODWARD, having knowingly transported and caused to be transported from Brazil into the United States monetary instruments in excess of $5,000.00, did willfully fail to file a report with the United States Customs Service in violation of Title 31, United States Code, Section 1101, and regulations thereunder.

separately and cumulatively punished for section 1001 and section 1101 violations arising from the same occurrence.

The first question has since been answered in the affirmative. In *United States* v. *Duncan*, 693 F.2d 971, 975 (9th Cir.1982), this circuit ruled that a defendant may be charged and convicted under 18 U.S.C. § 1001 even though 31 U.S.C. § 1058 expressly prohibits the same conduct. But *Duncan* did not involve, and thus did not decide, the question whether multiple punishments under both section 1001 and section 1058 may be aggregated consistently with the rule of *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).[2] We now answer that question in the negative.

In *Blockburger* v. *United States*, 284 U.S. at 304, 52 S.Ct. at 182, the Supreme Court laid down the basic rule that still governs the question whether a defendant can be punished cumulatively for one instance of conduct that violates two statutory provisions. "[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that [the] other does not." *Accord*, *Dixon* v. *Dupnik*, 688 F.2d 682, 684 (9th Cir.1982);

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[2] In one previously reported case, we have sustained multiple convictions under both 31 U.S.C. § 1058 and 18 U.S.C. § 1001. *United States* v. *Moore*, 638 F.2d 1171 (9th Cir.1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 924, 66 L.Ed.2d 842 (1981). However, the appellant in *Moore* did not at any stage raise a claim that the *Blockburger* rule bars such multiple convictions. The court likewise did not discuss the issue. Since the *Moore* decision created no binding precedent concerning the question, it remains open for resolution at this time. *See United States* v. *Tucker Truck Lines*, 344 U.S. 33, 38, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952).

United States v. *Goodheim*, 686 F.2d 776, 780 (9th Cir.1982); *United States* v. *Sanford*, 673 F.2d 1070, 1073 (9th Cir.1982).[3] Where analysis under the *Blockburger* rule reveals that two statutory provisions describe the same offense, the Supreme Court has consistently held that the two provisions will not be construed to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent. *See Missouri* v. *Hunter*, ___ U.S. ___, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983); *Whalen* v. *United States*, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 1437-38, 63 L.Ed.2d 715 (1980). We must therefore examine the elements of 18 U.S.C. § 1001 and 31 U.S.C. § 1058 to determine whether each requires proof of a fact that the other does not.[4]

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[3] Although Double Jeopardy Clause concerns certainly lie beneath the *Blockburger* rule, *see Dixon* v. *Dupnick*, 688 F.2d at 684, where federal statutes form the basis for prosecution, the *Blockburger* test functions strictly as a guide to Congress's intent. *Missouri* v. *Hunter*, ___ U.S. ___, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981); *see also id.* at 345, 101 S.Ct. at 1145 (Stewart, J., concurring) (disagreeing with this interpretation). This conclusion stems from the holding in *Brown* v. *Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977), that "the role of the [Double Jeopardy] guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."

[4] There is no question that in this particular case, proof of the facts necessary to convict Woodward of violating 31 U.S.C. § [*sic*] 1101 and 1058 established guilt under 18 U.S.C. § 1001 as well. However, this does not alone satisfy the *Blockburger* test. As *Blockburger* itself stresses, 284 U.S. at 304, 52 S.Ct. at 182, the test focuses upon whether the *elements* of either statutory offense are completely overlapped by the other. *See United States* v. *Ching*, 682 F.2d 799, 802 (9th Cir.1982). *But cf. Whalen* v. *United states*, 445 U.S. 684, 694, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715 (1980) (Court concluded that even though

18 U.S.C. § 1001,[5] as applied to a person who fails to properly declare currency in excess of $5,000, requires proof of elements strikingly similar to those necessary to procure a criminal conviction under the currency reporting statutes, 31 U.S.C. §§ 1101[6] and 1058.[7] A section 1001 conviction requires proof that the defendant

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a D.C. statute punishing killing in course of a felony may be violated without establishing all elements of rape where a different underlying felony is involved, the *Blockburger* test precludes an additional penalty for 'simple rape' [*sic*] where rape is in fact the underlying crime).

[5] 18 U.S.C. § 1001 (1976) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[6] 31 U.S.C. § 1101 (1976) provides, in pertinent part:

> (a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—
>
> (1) transports or causes to be transported monetary instruments—
>
> (A) from any place within the United States to or through any place outside the united States, or
>
> (B) to any place within the United States from or through any place outside the United States, or
>
> (2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States
>
> in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

[7] 31 U.S.C. § 1058 (1976) provides:

> Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned for not more than one year, or both.

(1) willfully falsified (2) a material fact (3) in a statement made with regard to any matter within the jurisdiction of the United States agency. *See United States* v. *Rose*, 570 F.2d 1358, 1363 (9th Cir.1978). A conviction under 31 U.S.C. § 1058 necessarily entails proof of all of these elements. 31 U.S.C. § 1052(k)(1976) expressly states that "[f]or the purposes of section 1001 of Title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of any agency of the United States." And in *United States* v. *Masters*, 612 F.2d 1117, 1122 (9th Cir.1979), *cert. denied*, 449 U.S. 847, 101 S.Ct. 134, 66 L.Ed.2d 57 (1980), we held that the concealed fact that a defendant was carrying over $5,000 in unreported currency was "material" for purposes of section 1001. Finally, section 1058 provides only for punishment of "willful" violations of the section 1101 reporting requirement.

In our view, the only "fact" that an 18 U.S.C. § 1001 conviction might possibly require, but that a 31 U.S.C. § 1101 conviction does not, is some affirmative misrepresentation on the part of the defendant. Section 1058 would plainly provide a basis for prosecuting a traveler who said nothing at all or who submitted a blank form when carrying monetary instruments in excess of $5,000, so long as the traveler knew both that he was carrying the instruments and that he was required by law to report them. *See United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir.1981) (requirement that act be "willful" means that it must be done "deliberately and with knowledge," citing *Hirsch* v. *INS*, 308 F.2d 562, 567 (9th Cir.1962)).[8]

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[8] The Fifth Circuit has suggested in dictum that such criminal liability under 31 U.S.C. § 1058 premised upon a "mere" willful

18 U.S.C. § 1001 by its express terms reaches any defendant who willfully "conceals or covers up" a material fact. A willful failure to file a customs report on currency in excess of $5,000 (as opposed to an innocent failure, which could not be prosecuted under 31 U.S.C. § 1058) is a form of "concealment." We have previously held that "concealment" may be punished under 18 U.S.C. § 1001. *United States* v. *Masters*, 612 F.2d 1117, 1122 (9th Cir.1979), *cert. denied*, 449 U.S. 847, 101 S.Ct. 134, 66 L.Ed.2d 57 (1980) (gems concealed on person of Master's companion). We conclude that 18 U.S.C. § 1001 could be applied to punish a traveler who willfully fails to file a report listing currency in excess of $5,000. It follows that a conviction under 31 U.S.C. § 1058 necessarily includes all elements of an 18 U.S.C. § 1001 violation. The *Blockburger* test therefore yields a strong presumption that Congress intended a willful failure to report currency to constitute a single offense.

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failure to file prevents section 1058 from containing all elements necessary for an 18 U.S.C. § 1001 conviction. *United States* v. *Andrez*, 661 F.2d 404, 408 n.12 (5th Cir.1981). But the Fifth Circuit's seeming assumption in *Andrez* that a section 1001 conviction requires some affirmative misrepresentation was short-lived. *See United States* v. *Hajecate*, 683 F.2d 894, 898-99 (5th Cir.1982), where the court rejected a claim that proof of a false statement is necessary under section 1001 with the comment that "[s]ection 1001 renders illegal intentional falsification and concealment, as well as false statements." The premise of the footnote in *Anderez* is certainly not the law in this circuit. *See United States* v. *UCO Oil Co.*, 546 F.2d 833, 836 (9th Cir.1976) (characterizing scope of section 1001 with statement that "[t]he law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other") (quoting *Charles Hughes & Co.* v. *SEC*, 139 F.2d 434, 437 (2d Cir.1943)), *cert. denied*, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977)).

The *Blockburger* test is a rule of statutory construction giving rise to a presumption against multiple punishment where its application as here results in a determination that the conduct is "one offense." *See Missouri* v. *Hunter*, ___ U.S. ___, 103 S.Ct. 673, 678-79, 74 L.Ed.2d 535 (1983). The presumption is overcome only by a clear indication of congressional intent to the contrary. *See Whalen* v. *United States*, 445 U.S. 684, 692, 100 S.Ct. 1432, 1438, 63 L.Ed.2d 715 (1980). We ask, therefore, whether we can find any "clear indication" of congressional intent to allow cumulative punishment under both statutory sections.

The history of 18 U.S.C. § 1001 does not show such an intent, in the first instance because that history was already complete by 1971 when the currency reporting statute was passed. Section 1001 was amended to its present form largely to provide a criminal sanction for reporting statute violators where other statutory sanctions are unavailable. *See United States* v. *Gilliland*, 312 U.S. 86, 93-95, 61 S.Ct. 518, 522-23, 85 L.Ed. 598 (1941). In considering a similar question, we have decided that section 1001 should be presumed not to apply in a manner that would duplicate the criminal sanctions imposed under other law. In *United States* v. *Rose*, 570 F.2d 1358, 1363 (9th Cir.1978), Judge Wright stated for the court that

> properly construed, [section 1001] serves as a catch-all, reaching those false representations that might 'substantially impair the basic functions entrusted by law to [the particular] agency,' but which are not prohibited by other statutes. The legislative history reveals no evidence of an intent to pyramid punishment for offenses covered by another statute as well as by § 1001.

Likewise, no clear indication of Congress's intent to impose double punishments under 18 U.S.C. § 1001 and 31 U.S.C. § 1058 is found in the rather sparse legislative history of the latter statute. The legislative statements generally suggest that Congress did not consider the possibility of double punishment when enacting the Currency and Foreign Transactions Reporting Act.[9] The most comprehensive and typical statement is contained in a Senate Report that accompanied the legislation:

> The significance of requiring reports is that it provides the Justice Department with another means of obtaining a conviction. The mere failure to file a report would constitute a criminal violation much easier to establish compared to proving the funds transported were illegally acquired or were to be used for an illegal purpose. Those who fail to report would be subject to a criminal penalty of a year in prison, a $1,000 fine, or both. If the failure to report was committed in furtherance of the commission of any other violation of Federal law, or as

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[9] In addition to the material quoted in text below, *see* H.Rep. No. 975, 91st Cong., 2d Sess. 21 (1970), U.S.Code Cong. & Admin.News 1970, p. 4394 (mentioning that "relatively modest" civil penalty sanction will be a great help in enforcing the Act); 116 Cong.Rec. 16,954 (1970) (remarks of Rep. Patman) (describing "penalties" without cross-reference to section 1001); *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 258 (1970) (statement of Robert H. Morgenthau that the proposed criminal sanctions of the act would be a "tremendous help" in preventing illegal currency shipments). None of these references demonstrate any awareness that secton 1001 would apply to currency smugglers, much less an intent to add the section 1001 sanctions to those provided under the Act. *See United States* v. *Duncan*, 693 F.2d 971, 986 (9th Cir.1982) (Fletcher, J., dissenting).

> part of a pattern of illegal activity involving transactions exceeding $100,000 a year, a person who fails to file a report is subject to a much stiffer penalty—five years in jail, or a $500,000 fine, or both. Finally, any unreported currency is subject to seizure and forfeiture to the United States and those who fail to make required reports are liable for a civil penalty equal to the amount of currency transported less any amount already seized and forfeited.

S.Rep. No. 1139, 91st Cong., 2d Sess. 7 (1970). From this discussion, we glean no evidence of any kind that Congress intended to impose section 1001 penalties upon currency reporting violators in addition to those provided by 31 U.S.C. § 1058. Certainly, the "clear indication" that would be necessary to override the *Blockburger* test is not manifest.[10] We consequently must apply the *Blockburger* rule of statutory construction to hold that Congress intended the failure to report currency in excess of $5,000 upon entry into or departure from the United States to constitute only a single offense.

For the foregoing reasons, we hold that 18 U.S.C. § 1001 is an included offense within a conviction under 31 U.S.C. § 1058 stemming from a willful violation of

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[10] We reject the Fifth Circuit's conclusion concerning legislative intent in *United States* v. *Anderez*, 661 F.2d 404, 408 n.12 (5th Cir.1978). That court concluded Congress must have intended to permit convictions under both statutes. But the legislative history cited in support of that conclusion shows at most that Congress did not intend to preclude conviction under 18 U.S.C. § 1001 by enacting 31 U.S.C. § 1101. *See id.* at 406-08.

31 U.S.C. § 1101.[11] Where a defendant is improperly convicted of violating both section 1001 and another statute that includes all elements of section 1001, our practice has been to vacate the section 1001 conviction. *E.g., United States* v. *Rose*, 570 F.2d 1358, 1363 (9th Cir.1978). This practice flows from the general rule that a conviction for a lesser included offense merges into a conviction for the greater offense.[12] *See United States* v. *Parson*, 452 F.2d 1007, 1009 (9th Cir.1971); *Whalen* v. *United States*, 379 A.2d 1152, 1158 (D.C.1977), *rev'd on other grounds*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Accordingly, Woodward's conviction on Count One is reversed.

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[11] We recognize that a certain degree of incongruity inheres in the notion that 18 U.S.C. § 1001, which carries a maximum penalty of five years in prison and $10,000 fine, is "included" within 31 U.S.C. § 1058, which carries a maximum penalty of one year in prison and a $1,000 fine. We must stress, however, that we are merely following the presumed intent of Congress in this regard. This circuit has previously confronted the anomolous fact that Congress chose to punish as a misdemeanor conduct that was already a felony under other law without finding any undue consistency. Compare *United States* v. *Duncan*, 693 F.2d 971, 975 (9th Cir.1982), *with id.* at 985-86 (Fletcher, J., dissenting). *See also infra* n.11 [*sic*].

[12] *Parson* speaks of the lesser offense merging into the "more serious" offense. 452 F.2d at 1009. Since the penalty for violation of section 1001 is more severe than the penalty under section 1058, section 1001 is arguably the "more serious" offense. However, this court in *Rose* vacated the defendant's conviction under section 1001 rather than his conviction under 18 U.S.C. § 542, even though the penalty under section 542 (imprisonment of not more than two years and fine of not more than $5,000) is less than the penalty under section 1001. In light of *Rose*, the reference in *Parson* to the "more serious" offense must be taken as a reference to the "greater" as opposed to the "lesser included" offense.

II

Miranda *Violation*[.]

Woodward also contends that his conviction should be reversed because it was based upon statements obtained in violation of the rights protected by the rule of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Woodward's *Miranda* claim focuses upon the fact that the various Customs and Justice Department officials with whom he spoke never advised him that his statements might be used as incriminating evidence in a later criminal prosecution. He contends that had he been given such a warning, he would not have made assertions to Agents Shruhan and Olson and to Assistant U.S. Attorney Petersen that were inconsistent with the statements he made to Customs inspectors at the airport.

The Government officials involved in this case became obligated to inform Woodward of his *Miranda* rights as soon as they had probable cause to suspect that Woodward was willfully violating the currency reporting statute.[13] *United States* v. *Duncan*, 693 F.2d 971, 979 (9th Cir.1982). *See also United States* v. *Estrada-Lucas*, 651 F.2d 1261, 1265 (9th Cir.1980). In the case of 31 U.S.C. § 1058, however, government of-

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[13] We reject as specious the Government's contention that because the individual officials who dealt with Woodward were unaware that Woodward was actually being considered as a candidate for prosecution, they were under no obligation to inform him of his *Miranda* rights. Each of these officials plainly knew that criminal prosecution under 31 U.S.C. § 1058 is a possible sanction for currency reporting violators. After the initial probable cause threshold was reached, each of these officials should have warned Woodward of the chance that his statements might prove incriminating.

ficials do not have probable cause to believe that an offense has been committed until they have probable cause to conclude *both* that the suspect is carrying over $5,000, *and* that the suspect's failure to report the currency is "willful," *i.e.*, that the suspect knows of the reporting requirements of 31 U.S.C. § 1101. Only then do government officials have probable cause to believe that all elements of a section 1058 violation have occurred. *See United States* v. *Duncan*, 693 F.2d 971, 979 (9th Cir.1982); *United States* v. *Moore*, 638 F.2d 1171, 1175 (9th Cir.1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 924, 66 L.Ed.2d 842 (1981). Our review of the record convinces us that Customs agents had probable cause to believe that Woodward had committed the statutory offense the moment Woodward admitted he was carrying unreported currency. At that point, the agents knew Woodward had lied on a form that informed him of his obligation to report the currency. The agents should have given Woodward *Miranda* warnings at that time.

The Government contends that even if such warnings were due, still no *Miranda* violation occurred because Woodward's statements were not made in the course of a custodial interrogation. We do not decide this issue, because we conclude that even if evidence of statements obtained in violation of *Miranda* was wrongfully admitted, the error was harmless beyond a reasonable doubt and the conviction must be sustained.

To establish a violation of 31 U.S.C. § 1058, Government prosecutors were required to prove only two things: (1) that Woodward attempted to carry unreported currency in excess of $5,000 into the United States, and (2) that he did so deliberately, knowing that

he was required to submit a currency report to U.S. Customs officials. Even excluding all statements obtained from the defendant after he should have been given *Miranda* warnings, the evidence against Woodward on both points was overwhelming. Woodward signed and submitted a customs declaration form that stated that neither he nor any family member was carrying over $5,000. Evidence at trial indicated that Woodward was familiar with the form. The money was found secreted in Woodward's boot and in a money belt concealed under his wife's clothing. Woodward's admission to the customs agent that he had been told of his legal obligation to declare the currency, and the "inconsistency" between this statement and later statements made by Woodward, were immaterial. Woodward's trial defense that his failure to declare the currency was the product of misunderstanding or mistake was without support in the record and was therefore totally implausible.

For these reasons, we conclude that any error in the admission of statements made by Woodward to government officials after he should have received *Miranda* warnings was harmless beyond a reasonble doubt.[14] The conviction under 31 U.S.C. § 1058 is affirmed. *See United States* v. *Duncan*, 693 F.2d 971, 979 (9th Cir.1982); *United States* v. *Lemon*, 550 F.2d 467, 471 (9th Cir.1977); *United States* v. *Casimiro-Benitez*, 533 F.2d 1121, 1124-26 (9th Cir.), *cert. denied*, 429 U.S. 926, 97 S.Ct. 329, 50 L.Ed.2d 295 (1976).

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[14] For similar reasons, we need not consider whether the statements made by Woodward after the March 1 airport incident should have been excluded on the authority of *United States* v. *Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1976).

CONCLUSION

The conviction under 31 U.S.C. § 1058 is affirmed; the conviction under 18 U.S.C. § 1001 is reversed. When one of several convictions is reversed because of merger, the general rule in this circuit is that the entire sentence must be vacated and the case remanded for reconsideration of the proper sentence to be imposed. *See United States* v. *Diogenes*, 638 F.2d 125, 128 (9th Cir.1981); *United States* v. *Oropeza*, 564 F.2d 316, 324 (9th Cir.1977), *cert. denied*, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1976); *United States* v. *Parson*, 452 F.2d 1007, 1009 (9th Cir.1971). From the record in the present case, however, it appears that Woodward has fully served his sentence on Count One (the invalid section 1001 conviction), a six month prison term that began in March 1981. All that remains is the three year probation period imposed under Count Two.[15] Under these circumstances, the district court upon remand may reduce or vacate this probation period, but cannot increase it or order the defendant to serve an additional prison term. Otherwise, an illegal cumulation of punish-

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[15] As part of Woodward's sentence, the district court attempted to impose a requirement that Woodward inform any future employer of his criminal record. The requirement apparently is not intended as a condition of probation and has no stated termination date. Neither 31 U.S.C. § 1058 nor 18 U.S.C. § 1001 authorizes such a penalty. Nor would the penalty fall within the range of discretion accorded a trial judge by the Federal Probation Act, 18 U.S.C. §§ 3651-3656 (1976). *See Higdon* v. *United States*, 627 F.2d 893, 897-900 (9th Cir.1980); *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 263-64 (9th Cir.1975) (en banc). The district court therefore did not have discretion to impose such a condition, and this portion of Woodward's sentence is void.

ment would result. *United States* v. *Edick*, 603 F.2d 772, 778 (9th Cir.1979). Subject to this consideration, the case is remanded for resentencing.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1140

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CHARLES NOEL WOODWARD,
DEFENDANT-APPELLANT

[Filed Feb. 29, 1984]

ORDER

Before: KASHIWA,* Court of Claims Judge, FLETCHER, and NORRIS, Circuit Judges.

The Government's petition for rehearing by the panel and suggestion for rehearing en banc are denied. The petition has been circulated to the full court and no judge has requested that the case be reheard en banc.

The opinion dated August 5, 1983 is modified as follows: The second, third, fourth and fifth paragraphs of Part II are hereby deleted.

The following is inserted in their stead:

> We need not decide whether Woodward's *Miranda* rights were violated because we conclude that even if statements were obtained in violation of *Miranda*, their admission into evidence was

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[1] *The Honorable Shiro Kashiwa, Associate Judge, U.S. Court of Claims, sitting by designation.

harmless error beyond a reasonable doubt and the conviction must be sustained.

To establish a violation of 31 U.S.C. § 1058, Government prosecutors were required to prove only two things: (1) that Woodward attempted to carry unreported currency in excess of $5,000 into the United States, and (2) that he did so deliberately, knowing that he was required to submit a currency report to U.S. Customs officials. Even excluding all statements obtained from the defendant after he claims he should have been given *Miranda* warnings, the evidence against Woodward on both points was overwhelming. Woodward signed and submitted a customs declaration form that stated that neither he nor any family member was carrying over $5,000. Evidence at trial indicated that Woodward was familiar with the form. The money was found secreted in Woodward's boot and in a money belt concealed under his wife's clothing. Woodward's admission to the customs agents that he had been told of his legal obligation to declare the currency, and the "inconsistency" between this statement and later statements made by Woodward, were immaterial. Woodward's trial defense that his failure to declare the currency was the product of misunderstanding or mistake was without support in the record and was therefore totally implausible.

For these reasons, we conclude that any error in the admission of statements made by Woodward to government officials after Woodward claims he should have received *Miranda* warnings was harmless beyond a reasonable doubt.[13] The conviction under 31 U.S.C. § 1058 is affirmed. *See United States* v. *Duncan*, 693 F.2d 971, 979 (9th Cir.1982); *United States* v. *Lemon*, 550 F.2d 467, 471 (9th Cir.1977); *United States* v. *Casimiro-*

Benitez, 533 F.2d 1121, 1124-26 (9th Cir.), *cert. denied*, 429 U.S. 926, 97 S.Ct. 329, 50 L.Ed.2d 295 (1976).

Footnote 13 is deleted in its entirety. Succeeding footnotes are accordingly renumbered.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1140
DC. No. CR 80-1090(A)-MM

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

JOHN [*sic*] NOEL WOODWARD,
DEFENDANT-APPELLANT

[Filed June 18, 1982]

ORDER

Before: KASHIWA, Court of Claims Judge, FLETCHER and NORRIS, Circuit Judges.

The within case is hereby withdrawn from submission.

The parties are hereby ordered to submit supplemental briefs on the following issues:

(1) Whether the evidence was sufficient to establish the elements of an offense under 18 U.S.C. § 1001. The parties may wish to consider the effect on this issue of *United States* v. *Carrier*, 654 F.2d 559 (9th Cir.1981); *United States* v. *Rose*, 570 F.2d 1358 (9th Cir.1978), and *United States* v. *Bedore*, 455 F.2d 1109 (9th Cir. 1972).

(2) Whether Woodward's convictions under 31 U.S.C. §§ 1058, 1059 & 1101, and 18 U.S.C. § 1001 vi-

olate the prohibition against double jeopardy. The parties may wish to consider the effect on this issue of *United States* v. *Rose*, 570 F.2d 1358 (9th Cir.1978).

Simultaneous briefs shall be submitted on or before 21 days from the date of this order. Any reply briefs shall be filed on or before ten days thereafter. The opening briefs shall be no more than twenty-five (25) pages in length; any reply briefs, no more than ten pages.

The case shall be resubmitted upon further order of the court.